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2 UNITED STATES OF AMERICA
3 BEFORE THE NATIONAL LABOR RELATIONS BOARD
4 REGION 19

5 moovel North America LLC,
6 Employer,
7 and
8 Communication Workers of America,
9 AFL-CIO,
10 Petitioner/Union.

Case 19-RC-311654

**EMPLOYER'S POST-HEARING
BRIEF**

9 **I. INTRODUCTION**

10 Petitioner Communication Workers of America AFL-CIO ("the Union") filed a
11 representation petition on February 6, 2023. moovel North America LLC ("moovel" or
12 "Employer") the employer, objects to the Petition on the basis that certain employees in the
13 proposed bargaining unit should be excluded because they are supervisors under section 29
14 U.S.C. §152(11) ("§2(11)") of the National Labor Relations Act (the "Act"). It is well-settled
15 that to qualify as a supervisor, an individual need only possess one of the functions specified in
16 section §2(11) of the Act along with the corresponding independent judgment. *Oakwood*
17 *Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *Lakeview Health Center*, 308 NLRB 75, 78 (1992).
18 One of those functions is the authority to assign and direct responsibilities.

19 At hearing, moovel presented evidence that proposed bargaining unit employees Matt
20 Tycker (Technical Support Supervisor), Logan Holmes (Lead Mobile Developer) and Alex
21 Warnes (Sr. Software Engineer) have the authority to assign and direct the work responsibilities
22 of other employees. Each exercises their authority on a daily basis based on their independent
23 judgment. This authority has been expressly provided to them by the VP of Engineering, Isaac
24 Elliot. These employees create work assignments for and meet with their direct reports usually
25 daily to assign, direct, prioritize, assist and review work product. Based on the evidence
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presented, moovel met its burden of proof to show that Matt Tycer, Logan Holmes and Alex Warnes are statutory supervisors and should be excluded from the proposed bargaining unit.

II. PROPOSED BARGAINING UNIT

Pursuant to the Petition, the proposed bargaining unit is “All full-time and regular part-time Engineering Department Employees (currently employees in the titles of Senior Software Engineer, Lead Mobile Developer, Android Developer, iOS Engineer, Technical Support Supervisor, and Technical Support Representative,” excluding “[a]ll supervisors, confidential, managerial employees and guards as defined by the Act.”

III. ISSUES

The issue to be decided is whether Matt Tycer, Logan Holmes and/or Alex Warnes are supervisors under the Act and should therefore be excluded from the proposed bargaining unit.

IV. FACTUAL OVERVIEW

A. Summary of Employer’s Business Operations

moovel is an early-stage technology company serving the public transit industry. moovel is wholly owned by Mr. Bram Granovsky who continues to personally fund the large operating losses of the company. There are currently 19 employees who work fully remotely since the COVID pandemic. As shown in Employer’s Exhibit A from the hearing, there are four executive leaders who report to Bram. One of those leaders is the VP of Engineering, Isaac Elliott, who is responsible for all the technology development of the company. Isaac organized his department with a level of managers (designated as Manager/Tech Lead in the organization chart) underneath him to provide operating leverage.

The Manager/Tech Lead level employees manage daily activities and software development deliverables. Isaac meets with his Manager/Tech Leads once a week and has approximately monthly meetings with the staff level employees under the Manager/Tech Leads.

Each of the Manager/Tech Leads are responsible and accountable for the productivity and delivery of their specific area.

V. AUTHORITY AND ARGUMENT

A. Supervisory Status is Triggered by Any One of the § 2(11) Functions

Under the National Labor Relations Act, the definition of an employee eligible to bargain collectively specifically excludes “any individual employed as a supervisor.” 29 U.S.C. § 152(3) and § 157. The Act defines a supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Board has repeatedly interpreted this provision to mean that a person is a supervisor under the Act if (1) they have authority to take any one of 12 enumerated actions or to “effectively recommend” any of those actions; (2) “the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and (3) the authority is held in the interest of the employer. *Extendicare Health Services v. NLRB*, 182 Fed.Appx. 412, 179 LRRM 2769, 2770 (6th Cir. 2006); 348 NLRB at 687; *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001) (citing *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994)).

The first part of Section §2(11) does not incorporate a balancing test nor a weighing of how many of the indicia are present. “To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in the Act. Rather, possession of any one of them is sufficient to confer supervisory status.” *Lakeview Health Center*, 308 NLRB 75, 78 (1992) (citing *Somerset Welding & Steel, Inc.*, 291 NLRB 129, 913 (1998)); *see also NLRB v. Chicago Metallic Corporation*, 794 F.2d 527, 531 (9th Cir. 1986) (citing *NLRB v. Island Film Processing*

1 Co., 784 F.2d 1446, 1451 (9th Cir. 1986)). The Employer meets the burden of proof by providing
2 specific evidence regarding any one of the 12 enumerated actions. See 348 NLRB at 698; see
3 generally *Kentucky River Community Care*, 532 U.S. at 710-711 (holding the party claiming the
4 employee is a supervisor has the burden of proving a challenged employee's supervisory status).

5 The second part of the test considers whether supervisors use independent judgment in
6 their exercise of any one of the 12 enumerated actions. Judgment means "the action of judging;
7 the mental or intellectual process of forming an opinion or evaluation by discerning and
8 comparing." 348 NLRB at 692 (citing *Websters Third New International Dictionary* 1223
9 (1981)). The degree of independence "lies somewhere in between" the "extremes of completely
10 free actions and completely controlled ones." *Id.* at 693. Actions lack independence if they are
11 "dictated or controlled by detailed instructions," but on the other hand, the mere existence of
12 company policies does not eliminate independent judgment if the policies allow for discretionary
13 choices. *Id.*

14 The third part of the test assesses whether an alleged supervisor holds authority in the
15 interest of the employer.

16 **B. Employees Tycer, Homes and Warnes Exercise Assignment and Responsible**
17 **Direction Authority and Independent Judgment**

18 The evidence presented at hearing underscores that Matt Tycer, Logan Homes and Alex
19 Warnes do not just possess the paper authority but the actual authority to "assign" and "direct"
20 work of other employees, two of the 12 enumerated actions of Supervisors under the Act. Under
21 *Oakwood Healthcare*, the hallmark of responsible direction is accountability. The Board stated,
22 "for direction to be 'responsible,' the person directing and performing the oversight of the
23 employee must be accountable for the performance of the task by the other, such that some
24 adverse consequence may befall the one providing the oversight if the tasks performed by the
25 employee are not performed properly." 348 NLRB at 691-92.

1 In the case of Matt Tycer (Technical Support Supervisor), the VP of Engineering Isaac
2 Elliott testified at hearing that Matt is solely responsible for assigning, supervising and managing
3 all the work of Technical Support Rep Jill Eggers. In discussing Employer's Exhibit D, Jill
4 testified that she meets daily with Matt to review the pending work assignments. By comparison,
5 in discussing Employer Exhibit F, Jill testified that she has gone weeks without the need to meet
6 with Isaac Elliott. Jill later testified that special projects are also directed and approved by Matt
7 and that she appealed to Matt rather than Isaac or Bram for an increased salary. As a staff level
8 employee, Jill requires regular supervision, and Isaac testified that he relies on Matt to provide
9 that regular supervision so that Isaac does not have the need to meet with Jill more regularly.

10 In the case of Logan Holmes, Isaac Elliott's testimony regarding Employer Exhibits H &
11 I confirmed that in exchange for Logan taking on management responsibility for the mobile
12 services team members Doye Emelue and Dillon Murphy in October 2022, Logan received a
13 \$20,000 (equivalent to 14%) increase in compensation and a promotion to Lead Mobile
14 Developer. Prior to this salary increase and promotion, Logan did not have supervisory
15 responsibility for these employees. Isaac further testified that Logan is responsible for the mobile
16 services software development and as such is held accountable for the productivity of Doye and
17 Dillon. Isaac's testimony is supported by Employer's Exhibit J, which documented notes from
18 a meeting between Isaac and Logan, when Logan was providing negative performance
19 management feedback on Dillon. Further testimony from Isaac revealed discussion of a software
20 tool called 15Five used throughout the Engineering department. Isaac stated that he set the tool
21 up for his team to help provide performance feedback in his organization. More specifically,
22 Isaac testified that he adjusted the tool's settings so that Logan could provide feedback only for
23 Doye and Dillon, because they were Logan's direct reports. Isaac testified that Logan does not
24 use the tool to provide feedback about anyone else in the Engineering organization except his
25 two direct reports (Doye and Dillon).
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1 In the case of Alex Warnes, Isaac Elliot testified that Alex has had supervisory
2 responsibility for the Services team and managed Kurt Griffith and Geoffrey Kolstead since
3 2021. Alex's management duties are temporarily paused to allow Alex more focused time to
4 complete a client deliverable. This testimony was supported by Employer Exhibit K, a screenshot
5 of the performance management tool 15Five showing the feedback Alex has been providing
6 Geoffrey between November 2022 until February 1, 2023.

7 Addressing the second part of the test, Matt Tycer, Logan Holmes and Alex Warnes
8 exercised independent judgment in assigning and directing the work of their direct reports. These
9 employees have the independent authority to direct all work activities of other employees through
10 creation of the assignments, daily meetings to prioritize the assignments, and review of the
11 quality of work produced. Isaac stated in testimony that he holds Matt, Logan and Alex
12 responsible to ensure their direct reports are working on the required tasks and that he does not
13 attend the daily meetings they each have with their team because he relies on Matt, Logan and
14 Alex for that level of detailed management. This was also discussed in Logan's testimony
15 regarding Employer's Exhibit M which showed the daily meetings on Logan's calendar. Logan
16 stated that he writes the task assignments, called "tickets," which are specific work assignments/
17 tasks for Doye and Dillon to complete. Jill also stated that Matt approves her work.

18 Finally, in accord with *NLRB v. Health Care & Retirement Corp. of America*, 511 US
19 571 (1994), there is no question that Matt Tycer, Logan Holmes and Alex Warnes exercise their
20 authority to assign and direct work "in the interest of the employer." moovel provided
21 management authority to these three employees in an attempt to supervise moovel's workforce
22 more efficiently and to increase productivity. The exercise of that authority was in the interest
23 of moovel's business, rather than the personal goals of Matt Tycer, Logan Holmes and Alex
24 Warnes.
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1 **C. Secondary Indicia Also Demonstrate That moovel Employees Tycer, Holmes and**
2 **Warnes are Supervisors**

3 While secondary indicia themselves are insufficient to establish supervisory status, they
4 can be corroborating evidence of supervisory status where at least one characteristic of
5 supervisory status has been demonstrated. moovel presented evidence of such secondary indicia.
6 First, Matt Tycer, Logan Holmes and Alex Warnes attend management meetings with the VP of
7 Engineering when their respective direct reports are not present. These meetings involve
8 discussion of two-week sprint planning, which dictates the objectives of the supervisors'
9 respective teams. *See Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1118 (2007)
10 (persons held to be supervisors had attended management meetings).

11 Second, supervisory status is shown through the job description designating Matt Tycer
12 as a Supervisor. Isaac Elliott testified that Matt has full responsibility and oversight over Jill
13 Eggers, the only Technical Support Representative. Similarly, there are two employees directly
14 under Logan Holmes in the organization chart. Isaac testified that the organization chart
15 accurately reflects Logan's direct supervision of those employees.

16 **VI. CONCLUSION**


17 Assessments of whether employees are supervisors as defined by the Act are inescapably
18 intertwined with moovel's small organization size and the resulting supervisory structure.

19 Documentary evidence presented by moovel and the testimony offered not only by
20 moovel witnesses but also by the Union's own witnesses substantiate that Matt Tycer, Logan
21 Homes and Alex Warnes meet the Act's supervisory criteria. These employees have the
22 independent authority to manage the activity of others on a daily basis, consistent with moovel's
23 organizational structure, management meeting schedules, and their performance feedback
24 documentation. Moovel has met its burden of proving that the Matt Tycer, Logan Holmes and
25 Alex Warnes should be excluded from the proposed bargaining unit on the basis that they are
26 supervisors as defined under section 29 U.S.C. §152(11) of the Act. They each they use such

1 supervisory power with the exercise of independent judgment and secondary indicia corroborate
2 their supervisory function as defined by the Act.

3 Respectfully Submitted this 16th day of March, 2023.

4 moovel North America LLC

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6 By 
7 Heather Greenberg, Chief Financial
8 Officer